Supreme Court, U.S.
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No. 85-49

In The
Supreme Court of the United States
October Term, 1984

NICHOLAS P. PACELLA,

Petitioner,

Vs.

MILFORD RADIO STATION d/b/a
RADIO STATION WMRC and JOSEPH HYDER,

Respondents.

On Petition for Writ of Certiorari to Review a Judgment Of the Supreme Judicial Court of Massachusetts

BRIEF OF RESPONDENTS, MILFORD RADIO STATION d/b/a RADIO STATION WMRC and JOSEPH HYDER, IN OPPOSITION

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QUESTION PRESENTED

Was the decision of the Massachusetts Appeals Court, affirmed by the Supreme Judicial Court—that the petitioner failed to show by clear and convincing proof that respondents permitted a statement to be broadcast with reckless disregard of whether it was false or not—in conflict with applicable decisions of this Court?

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STATEMENT OF THE CASE

Respondent is satisfied with petitioner's statement of the case, except that the following facts were omitted:

1. The alleged libel took place during the following dialogue between the caller and respondent Hyder:

Hyder:	Hello . . . you're on the air for Counterpoint.
VOICE:	Thank you. Ah - is it possible to ask a question of . . .
Hyder:	You're on the air right now. Go ahead, please.
VOICE:	I have a question for Mr. Pacella.
Hyder:	Mr. Fernandes is here. Mr. Pacella was on tape recording earlier. He was not present.
VOICE:	So I can't ask a question of him?
Hyder:	He's not here to answer. How can you possibly do that, dear? If you can tell me how, I'll be happy to relay the question.
VOICE:	Well, could I ask the question and you can relay it to him?
Hyder:	Well, ah, by the time we get an answer the election will be over. Rhetorically, if you want to ask it, go ahead.
VOICE:	Pardon?
Hyder:	Go ahead.
J. Fernandes:	Maybe I could answer for him.[1]

[1] Mr. Fernandes was one of the candidates who appeared live on the program.

Hyder: Yeah. Go ahead, ask the question.

VOICE: All right. He is represented by the Concerned Citizens, and their motto is "The people have a right to know" which I agree with. Especially when the integrity of a candidate is in doubt. My question is: Did you, Mr. Pacella, during the construction of your home, ever take without authority certain building materials from the construction site? And were you brought in for questioning by the Milford Police and let go because the owner wouldn't press charges? That is my question.

2. A short while later in the program, petitioner's wife and one of his political supporters called in to deny the accusation, and Hyder concluded that portion of the program as follows:

Hyder: Mrs. Pacella, thank you so much for calling. I'm glad that you were able to clarify it for us, and I think that somebody has taken advantage of the opportunity, the fact that your husband was not here to reply, and I think that you've handled it very nicely.

3. Sometime prior to the May 6 broadcast, petitioner discussed the rumor at a meeting attended by 25 to 50 of his campaign workers, and it was decided that, should the rumor be mentioned to any of them, they should deny it. Nevertheless, although the rumor was of obvious concern to petitioner, he never alerted Hyder to the possibility that the subject of the rumor might be raised during the broadcast and did not discuss the subject with Hyder either when Hyder contacted him some weeks prior

to the broadcast to ask if petitioner wanted to join the other candidates on the show or later when they discussed the format of the show.

4. Hyder testified that he had never harbored any ill will, malice or other bad feelings toward petitioner, and petitioner testified that he had no knowledge to the contrary.

5. Even accepting as true, although Hyder denied it, that Hyder had a conversation with Mrs. Heller in which she denied that there was any truth to the rumor, there was evidence that Mrs. Heller had not even met petitioner until 1966, and thus she had no personal knowledge of events alleged to have occurred in 1962.

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REASONS FOR DENYING THE WRIT

The Decision of the Massachusetts Courts Was in Accord with the Decisions of This Court.

There is no dispute that petitioner, as a candidate for public office, was a public figure within the meaning of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and that as such he is barred from recovering damages for the publication of a defamatory falsehood "unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 270, 279-280. He must carry that burden by proof that is "clear and convincing." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

Petitioner does not claim that respondent Hyder had actual knowledge of the claimed falsity of the remarks. He claims that Hyder allowed the remarks to be broadcast with reckless disregard of whether the comments were false or not.

In First Amendment cases, reviewing courts have "an obligation 'to make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression,' " *Bose Corp. v. Consumers Union of U.S., Inc.*, — U.S. —, 80 L.Ed. 2d 502, 515, 104 S.Ct. 1949, 1958 (1984), quoting *New York Times v. Sullivan, supra,* 376 U.S. at 284-286. Such review is particularly exigent when the case arises in the context of a campaign for public office, see *Monitor Patriot Co. v. Roy,* 401 U.S. 265 (1971), and the Massachusetts courts were faithful and responsive to this command.[2]

As this Court said in *Bose Corp. v. Consumer Union, supra,* "(T)here is a significant difference between proof of actual malice and mere proof of falsity . . ." — U.S. at —, 80 L.Ed.2d at 523-524, 104 S.Ct. at 1965, and the Massachusetts court, relying on decisions of this Court, properly applied a standard of reckless disregard which required "at least that Hyder be aware of the 'probable falsity' of the caller's remarks" (*Pacella v. Milford Radio Corp.*, 18 Mass. App. Ct. 6, 10 (1984); Petition, 11a), citing

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[2] The Massachusetts Appeals Court decision in *Pacella* was issued on April 17, 1984. *Bose* was decided on April 30, 1984. While *Bose* of course reiterated that independent appellate review of the whole record is required in First Amendment cases, it is perhaps most significant for its holding that such review is not delimited by the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure.

Gertz v. Robert Welch, Inc., supra, 418 U.S. at 334-335 n. 6; *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964); *St. Amant v. Thompson,* 390 U.S. 727, 730-731 (1968).

As required by *Bose, supra,* — U.S. at —, 80 L.Ed.2d at 513, 104 S.Ct. at 1956, the Massachusetts court recognized that "the actual malice determination rests entirely on an evaluation of [Hyder's] state of mind" at the time he allowed the broadcast (see 18 Mass. App. Ct. at 12; Petition, 7a). The court on review fully considered all of the facts bearing on such "mental element" that petitioner again urges constitute proof by clear and convincing evidence:

—*The anonymous source of the remarks (18 Mass App. Ct. at 1415; Petition 9a-10a)*: while the court recognized that an anonymous call may carry less reliability than one from an identified source, the court placed this factor in proper context by recognizing that on this kind of spontaneous talk show a caller purporting to identify himself could give a false name, "and the host would be none the wiser" (18 Mass. App. Ct. at 15; Petition, 10a), and cautioned that the "robust and wide open debate" protected by *New York Times* would be jeopardized by shutting off from the general public "an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press." *New York Times v. Sullivan, supra,* 376 U.S. at 266.[3]

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[3] This same consideration undercuts all of the "factors" identified by petitioner at page 13 of his brief. Indeed, these

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—*Mrs. Heller's denial of the truth of the rumor* (*18 Mass. App. Ct. at 15; Petition, 10a*): as the court pointed out, in the climate of political campaigns "liability under the 'clear and convincing proof' standard . . . cannot be predicated on mere denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error." *Edwards v. National Audubon Soc., Inc.*, 556 F.2d 113, 121 (2d Cir.), *cert. denied sub nom. Edwards v. New York Times Co.*, 434 U.S. 1002 (1977). Nor can it be said that Mrs. Heller's denial of a rumor which Hyder had no inkling would be raised on his show is even remotely similar to the specific warning given by Butts to the *Saturday Evening Post* that specific material to be published at a specific time was false. See petitioner's reference to *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 161 n.23 (1967), at page 15 of his brief. In addition, Mrs. Heller did not even know petitioner in 1962 when the rumor originated, and thus her denials on petitioner's behalf could not have been based on her own knowledge in any event.

—*Hyder's "knowledge" of petitioner* (*18 Mass. App. Ct. at 15; Petition 10a*): there was no evidence that Hyder knew petitioner personally or knew anything about him in such detail or depth that would make the veracity of the caller's remarks "inherently improbable." *St. Amant v. Thompson*, 390 U.S. at 372.

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are the very kinds of factors "which would inhibit the freedom and spontaneity of the public dialogue," *Adams v. Frontier Broadcasting Co.*, 555 P. 2d 556, 565 (Wyo. 1976), and result in the very censorship which the First Amendment and *New York Times* guard against.

—Hyder's belief in the public's right to know (18 Mass. App. Ct. at 15-16; Petition 10a-11a): Hyder's testimony that he had time to make a judgment to allow the comments to air indicates only that he intentionally allowed the comments to air, not that he entertained doubts about their truth and certainly not that he had time, even assuming there was some obligation, for investigation or verification. Nor does his alleged after-the-fact statement that he allowed the broadcast "for effect" constitute evidence of malice so as to lose the protection of the First Amendment. *New York Times v. Sullivan, supra,* 376 U.S. at 286.

It is clear that the Massachusetts appellate courts conducted that "independent examination of the whole record" required by this Court in First Amendment cases. The result of that examination was the conclusion that petitioner had failed to show by clear and convincing proof that respondents permitted a statement to be broadcast with reckless disregard of whether the statement was true or not. Understandably, petitioner urges a different conclusion from that reached by the Massachusetts courts but he cites nothing which compels a different result.

In reviewing the record and affirming the judgment of the trial court, the Massachusetts appellate courts were faithful to the teachings of this Court. "Public discussion about the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the New York Times rule." *Ocala Star-Banner Co. v. Damron,* 401 U.S. 295, 300-301 (1971). "[T]he constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns

for political office." *Monitor Patriot Co. v. Roy, supra,* 401 U.S. at 272. The "safeguards" urged by petitioner to "protect" public figures such as himself would surely stifle the "robust and wide-open public debate" which the First Amendment guarantees and which this Court has unswervingly protected.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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